CHEONG HENG LOONG GOLDSMITHS (KL) SDN BHD & ANOR

v.

CAPITAL INSURANCE BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ALAUDDIN MOHD SHERIFF JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-450-1996]
26 DECEMBER 2003

CIVIL PROCEDURE: *Attachment - Claim against insurer - Evidence - Burden of proof - Whether there was attachable debt owing from insurer - Whether a contingency debt - Whether requisite contingency had crystallised - Evidence Act 1950, ss. 101, 102*

CIVIL PROCEDURE: *Pleadings - Attachment - Attachment of insurer's debt to insured - Denial of liability - Failure to plead breach of insurance policy - Whether insurer precluded from raising issue at trial*

EVIDENCE: *Burden of proof - Claim against insurer - Attachment of debt - Adjusters' report - Whether original evidence and not hearsay - Whether admissible - Contents of report adverse to insurer's interest - Whether binding on insurer - Whether constituting prima facie evidence on liability - Evidence Act 1950, ss. 18, 20, 21*

On 10 December 1984, one Chan Kim Swi ('Chan') lodged a claim with his insurer, the respondent, for losses arising from a robbery at his place of business. Having investigated the claim, the respondent's adjusters prepared a report ('P9') confirming that the robbery was genuine and not fraudulent. Subsequently, the appellant obtained a judgment against Chan for moneys owed, and thenceforth commenced garnishee proceedings against the respondent to attach the respondent's debt to Chan under the insurance policy. At the hearing, the respondent did not object to P9 when it was tendered but subsequently objected to it on the ground that it was hearsay. The respondent further denied liability on grounds that the robbery was faked and that Chan had breached condition 6 of the policy. The respondent had never pleaded breach of policy by Chan in the statement of defence, but that irrespective, the learned judge dismissed the appellant's claim ruling that the robbery was faked, that P9 was hearsay and inadmissible, that Chan

had breached a term of the policy and that there was no attachable debt in existence owed by the respondent to Chan. Dissatisfied, the appellant appealed. The issues were: (i) whether P9 ought to have been admitted into evidence, and if so whether it was not open for the respondent to have denied liability in the circumstances; and (ii) whether there was a debt owing from the respondent to Chan at the time of the commencement of the attachment proceedings by the appellant.

Held:
Per Gopal Sri Ram JCA

[1] The absence of an objection as to the mode of proving P9 before it was marked as an exhibit precluded the respondent from taking the point at the end of the case. The act of taking the objection at the end of the whole case had the effect of depriving the appellant from attempting proof by calling the maker of the document. This goes against the most elementary rules of procedural fairness. Accordingly, the High Court should have held that the truth of the contents of P9 had been proved. Further, the adjusters were the respondent's own agent such that P9 must be taken as the respondent's own document. The admission in P9 that Chan's claim was genuine and not fraudulent is substantive evidence that binds the respondent. The evidence is admissible under ss. 18, 20 and 21 of the Evidence Act 1950. (p 365 a-e)

[1a] The respondent was hence in error in arguing that the contents of P9 were hearsay and inadmissible and the High Court ought not to have accepted the erroneous submission. The finding of inadmissibility of the contents of P9 on the ground of hearsay is accordingly reversed. (p 366 c-d)

[2] The finding that the robbery was faked contradicts the admission in P9 and such finding cannot stand in the face of an admission to the contrary by the respondent. The appellant, having adduced the admission in P9, had discharged the tactical burden on it that the robbery was genuine and had indeed happened. The burden then shifted to the respondent to prove that the robbery was faked and never happened. This the respondent failed to do as it did not adduce any evidence to show that Chan had faked the robbery. (pp 367 a-b & 368 a)

[3] The respondent, in the statement of defence, had denied liability and had put the appellant to strict proof of its claim that there had been a robbery. There was no pleas of an affirmative case, namely the breach of policy condition 6. It was therefore manifestly not open at the trial for the respondent to pursue an unpleaded case alleging a breach of condition 6. Consequently, the learned judge was wrong in concluding that it is unnecessary for the respondent to plead condition 6 in its defence. The respondent's failure to plead a breach of policy condition 6 had disabled it from raising that issue at the trial. (pp 369 h & 371 f)

[4] The respondent's promise to indemnify Chan in the event of a genuine robbery had crystallised on the happening of the robbery which was established as genuine by the respondent's own document. The respondent's allegation that there were other breaches by Chan and that therefore there was no debt due and owing is inadmissible, as these were never pleaded. Accordingly, there was at all material times a debt due and owing in praesenti from the respondent to Chan which was capable of being attached by the appellant in the hands of the respondent at the date of the garnishee proceedings. (p 377 d-e)

[Order of High Court set aside; judgment for appellant for RM600,000]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pada 10 Disember 1984, seorang Chan Kim Swi ('Chan') telah membuat tuntutan kepada responden, penanggung insuransnya, atas kerugian yang dialami dalam satu rompakan di premis niaganya. Setelah menyiasat tuntutan, pelaras responden menyediakan laporan ('P9') mengesahkan bahawa rompakan benar-benar berlaku dan bukan suatu penipuan. Kemudian, perayu memperoleh satu penghakiman terhadap Chan bagi sejumlah wang yang terhutang, dan berikutnya memulai prosiding garnisi terhadap responden bagi menahan hutang responden kepada Chan di bawah polisi insurans. Semasa pendengaran, responden tidak membantah apa-apa apabila P9 diterima masuk, namun kemudiannya telah membantah kemasukan P9 atas alasan bahawa ia adalah pandang dengar. Responden seterusnya menolak liabiliti dengan alasan bahawa rompakan adalah dibuat-buat dan bahawa Chan telah melanggar syarat 6 polisi. Responden tidak pernah memplid apa-apa pelanggaran terma polisi oleh Chan dalam pernyataan pembelaannya, namun begitu, yang arif hakim telah menolak tuntutan perayu sambil memutuskan bahawa rompakan adalah dibuat-buat, bahawa P9 adalah pandang dengar dan tidak boleh diterima masuk, bahawa Chan telah melanggar terma polisi dan bahawa tidak wujud hutang dari responden kepada Chan yang boleh

ditahan. Tidak puas hati perayu merayu. Isu-isunya adalah: (i) sama ada P9 harus diterima masuk sebagai keterangan, dan jika begitu sama ada ianya tidak terbuka kepada responden untuk menolak liabiliti dalam halkeadaan yang wujud; dan (ii) sama ada terdapat suatu hutang yang boleh ditahan dari responden kepada Chan semasa prosiding penahanan dimulakan oleh perayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ketiadaan bantahan tentang cara pembuktian P9 sebelum ianya ditanda sebagai eksibit menghalang responden dari membangkitkan perihal tersebut di akhir kes. Perbuatan membangkitkan bantahan di penghujung keseluruhan kes telah menghindar perayu dari mencuba pembuktian dengan cara memanggil pembuat dokumen tersebut. Ini bertentangan dengan aturan keadilan prosedur yang paling asas. Oleh itu, Mahkamah Tinggi seharusnya merumuskan bahawa kebenaran kandungan P9 telah pun dibuktikan. Lagipun, pelaras-pelaras adalah agen responden yang berakibat P9 harus dianggap sebagai dokumen responden sendiri. Pengakuan dalam P9 bahawa tuntutan Chan adalah benar dan bukan penipuan adalah keterangan substantif yang mengikat responden. Ia boleh diterima masuk di bawah ss. 18, 20 dan 21 Akta Keterangan 1950.

[1a] Responden dengan itu silap apabila berhujah bahawa kandungan P9 adalah keterangan pandang dengar dan tidak boleh diterima masuk dan Mahkamah Tinggi seharusnya tidak menerima hujah yang salah ini. Dapatan tentang ketidakboleh-terimaan masuk P9 atas alasan pandang dengar dengan itu diakas.

[2] Dapatan bahawa rompakan adalah dibuat-buat bertentangan dengan P9 dan dapatan tersebut tidak boleh bertahan mengambilkira pengakuan sebaliknya oleh responden. Perayu, setelah mengemukakan pengakuan dalam P9, telah memuaskan tanggungan taktikal untuk membuktikan bahawa rompakan adalah tulen dan benar-benar berlaku. Beban selepas itu berpindah kepada responden untuk membuktikan bahawa rompakan adalah palsu dan tidak pernah berlaku. Ini gagal dibuat oleh responden kerana ia tidak mengemukakan sebarang keterangan bahawa Chan telah merekakan rompakan.

[3] Responden, dalam pernyataan pembelaannya, telah menolak liabiliti dan telah menuntut perayu membuktikan bahawa rompakan telah berlaku. Tidak terdapat apa-apa pengataan afirmatif berhubung pelanggaran syarat 6 polisi. Ianya dengan itu tidak terbuka kepada responden di perbicaraan untuk membangkitkan kes yang tidak diplid dengan mendakwa pelanggaran syarat 6. Ianya mengikut bahawa yang arif hakim telah silap apabila merumuskan bahawa ianya tidak perlu bagi responden untuk memplid syarat 6 dalam pernyataan pembelaan. Kegagalan responden untuk memplid pelanggaran syarat 6 polisi telah menghalangnya dari membangkitkan isu itu di perbicaraan.

[4] Janji responden untuk menanggung rugi Chan jika berlaku suatu rompakan yang tulen menjadi kenyataan apabila berlaku rompakan yang disahkan sebagai tulen oleh dokumen responden sendiri. Tuduhan responden bahawa terdapat beberapa pelanggaran lain oleh Chan dan kerana itu tidak wujud apa-apa hutang yang masih terhutang dan yang perlu dibayar tidak dapat diterima, disebabkan isu-isu ini tidak pernah diplid. Oleh itu, telah wujud di tangan responden hutang yang masih terhutang dan perlu dibayar in praesanti dari responden kepada Chan pada tarikh prosiding garnisi yang boleh ditahan oleh perayu.

[Perintah Mahkamah Tinggi diketepikan; penghakiman kepada perayu untuk jumlah RM600,000.]

Case(s) referred to:

Chan Kong Choy v. Inder Singh [1961] MLJ 1 ***(refd)***
Gopal Das v. Sri Thakurji AIR [1943] PC 83 ***(foll)***
Haji Mohamed Dom v. Sakiman [1956] MLJ 45 ***(foll)***
Katotikidis v. Mr Submarine Ltd [2002] ACWSJ 10135 ***(refd)***
Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645 HC ***(refd)***
Lam Choon & Co v. Lim Yam Hong [1931] SSLR 96 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 ***(foll)***
Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corp [1986] 2 MLJ 124 ***(refd)***
National ChemSearch Corp (SEA) Pte Ltd & Anor v. Hotel Ambassador (Malaysia) Sdn Bhd [1975] 2 MLJ 193 ***(refd)***
Regina Fur Co Ltd v. Bossom [1958] 2 Lloyd's Rep 425 ***(foll)***
Shanti Prasad Jain v. Director of Enforcement Foreign Exchange Regulation Act AIR [1962] SC 1764 ***(refd)***
Union of India v. Moksh Builders and Financiers [1977] AIR SC 409 ***(refd)***
Whiten v. Pilot Insurance Company [2002] 209 DLR (4th) 257 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 101, 102

Other source(s) referred to:
Sarkar on Evidence, 15th edn, vol 2, p 1452

For the 1st appellant - SY Lai (YW Mak); M/s SY Lai & Assoc
For the respondent - Tunku Farik Ismail; M/s Azim Ong & Krishnan

[Appeal from High Court, Kuala Lumpur; Civil Suit No: C2859-85]

JUDGMENT

Gopal Sri Ram JCA:
This is the judgment of the court.

There are two consolidated appeals before us. Their facts are not in dispute. The appellant before us is a creditor of one Chan Kim Swi ("Chan"). Chan was the second plaintiff in the court below. But he took no part at the trial. Chan had a policy of insurance with the respondent. The sum insured was RM600,000. The policy covered loss through robbery at Chan's place of business. On 10 December 1984, Chan lodged a claim with the respondent for loss that he suffered in a robbery that had occurred on 26 November 1984. On the same day the respondent appointed adjusters to investigate Chan's claim.The adjusters produced a report. It is dated 24 April 1985. It is exh. P9 in the record of proceedings in the court below. It is the single most important document in this case. It will be referred to in some detail later in this judgment.

We now resume the narrative. In August 1985, appellant obtained judgment against Chan for the sum owed to it. It then commenced garnishee proceedings against the respondent to attach the sum of RM600,000 which it said was a debt owed by the respondent to Chan. The respondent denied that any sum was owed under the policy and resisted the garnishee proceedings. On 6 July 1987, Shankar J ordered a trial of the issue between the appellant and Chan on the one side and the respondent on the other. He directed the appellant and Chan to be plaintiffs and the respondent to be defendant. He also gave directions as to the delivery and exchange of pleadings. After completion of the procedural formalities, the trial of the issues commenced on 7 June 1995 before the High Court. At the trial, the appellant sought to put in the respondent's adjusters report. The respondent took objection on the ground that the report was covered by privilege and therefore inadmissible. The learned judge overruled – in our view rightly overruled – the objection. The report was then put in and marked as exh. P9. At the conclusion of the trial, the learned judge held that there was no attachable debt in the hands of the respondent. He therefore dismissed the appellant's claim.

In his judgment, the learned judge arrived at his conclusion by the following route. Having admitted exh. P9, he upheld the respondent's argument advanced at the close of the whole case that its contents were hearsay and inadmissible. He held that the respondents were not liable to Chan under the policy for two reasons. First, because the robbery was faked: second because Chan had breached the terms of the policy. Lastly, he held that the respondent's liability to Chan under the policy of insurance was not an attachable debt.

All the issues raised before the learned judge were argued before us. The first point that we need to address is whether the contents of the adjuster's report (P9) are hearsay. It is to be noted at once that counsel for the respondent did not object to the contents of the report as being hearsay immediately upon the document being marked as an exhibit. He waited until the whole case was over and then took the point. He says that he was entitled to do so on the authority of *Malaysia National Insurance Sdn Bhd v. Malaysia Rubber Development Corp* [1986] 2 MLJ 124 where the former Federal Court held that hearsay evidence remained inadmissible even in the absence of an objection as to its admissibility. Lee Hun Hoe CJ (Borneo) when delivering the judgment of the court said:

> Ground 5 is concerned mainly with hearsay evidence. The appellant submitted that the learned Judge's view that the evidence of DW1 was hearsay was clearly erroneous. What PW1 and PW2 said to DW1 could not be hearsay. To support this proposition Woodroffe and Ameer AH, 13th Edition, page 1490, *Sarkar's Laws of Evidence*, 11th Edition, page 179 and *Stiles v. The Cardiff Steam Navigation Co* 33 LJ QB 310 were cited. In our view the material part of the evidence of DW1 was clearly hearsay evidence. His evidence was derived from interviews and not from his own knowledge. The learned Judge was perfectly right to hold that such evidence was hearsay. Objection should have been taken to the evidence of DW1. Hearsay evidence which ought to have been rejected does not become admissible merely because no objection was taken earlier.
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> The authorities are clear on this. Perhaps, it is only necessary to cite *Sarkar, Laws of Evidence*, 13th Edition, page 51 which reads:
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> > An erroneous omission to object to evidence not admissible or relevant under the Act does not make it admissible. It is the duty of the court to exclude all irrelevant or inadmissible evidence even if no objection is taken to its admissibility by the parties ...

Of course, counsel's argument will only hold good if the report in the present case is truly hearsay. And that is the very first issue we now address.

The evidence about the adjuster's report came from PW5. He testified that his company, Thomas Howell were instructed on 26 November 1984 to investigate into the robbery in question. He produced the report dated 24 April 1985 at which point counsel for the respondent took the objection based on privilege. In fact the point about the privilege against disclosure was taken in writing in the respondent's defence. That objection having been overruled, the report was put in evidence and marked. PW5 then proceeded to give the results of the investigation. He was cross examined very briefly. No cross examination was directed against the contents of the report. In other words, the contents of the report were simply not challenged at all. For example, it was not put to the witness that he had no personal knowledge of the matters stated in the report. Neither was there a demand by learned counsel for the respondent that the maker of the report be produced.

Now this omission by counsel to challenge PW5's knowledge of the contents of P9 and calling on the appellant to produce the maker of the contents of the document is a matter of considerable importance for the reason that there is a world of difference between inadmissible evidence and mode of proof at a trial. As Sir George Rankin said when delivering the advice of the Privy Council in *Gopal Das v. Sri Thakurji* AIR [1943] PC 83, 87:

> Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the **objection should be taken at the trial before the document is marked as an exhibit and admitted to the record.** A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial. (emphasis added.)

A failure to object "before the document is marked as an exhibit and admitted to the record":

> "amounts to a waiver of the objection to the admissibility of the document (see *Popatlal v. Visandji* [1962] AC 715). It amounts to an implied admission of the objection waived." (*Noliana bte Sulaiman v. Public Prosecutor* [2001] 1 CLJ 36, per Augustine Paul J.

Applying these pronouncements to the present instance, the absence of an objection as to the mode of proving the adjusters' report before it was marked as exh. P9 precluded the respondent from taking the point at the end of the case. The respondent's act of taking the objection at the end of the whole case had the effect of depriving the appellant from attempting proof by calling the maker of the document. This goes against the most elementary rules of procedural fairness. Accordingly, the High Court should have held that the truth of the contents of the adjusters report P9 had been proved.

There is a second and equally strong reason for holding P9 to be admissible as to the proof of its contents. There is no dispute about the role of the adjusters, Thomas Howell. They were appointed and expressly authorised by the respondent to investigate into Chan's claim. They were there to find out if Chan's claim was genuine or fraudulent and to report their findings to the respondent. That is precisely what they did. They prepared the report P9 in their capacity as the respondent's agent. The law simply regards their report not as their document but as the respondent's own document. The adjusters made admissions in the report (P9). They said that Chan's claim that he had been robbed was genuine and not fraudulent. That is an admission against the respondent's interest. It is admissible under ss. 18, 20 and 21 of the Evidence Act 1950. It is substantive evidence: *Lam Choon & Co v. Lim Yam Hong* [1931] SSLR 96: *Union of India v. Moksh Builders and Financiers* [1977] AIR SC 409. It binds the respondent.

This is not the first time that this sort of case has come before the courts. In *National ChemSearch Corp (SEA) Pte Ltd & Anor v. Hotel Ambassador (Malaysia) Sdn Bhd* [975] 2 MLJ 193 a man called Kirby who was representing the managing agents of the first defendant in that case was heard to make a statement of opinion to another person called Kellaway. That statement of opinion was prejudicial to the first defendant's case. Neither Kirby nor Kellaway were called. But other witnesses who had heard Kirby make the statement were called. It was held that the statement was an admission made by the first defendant's agent and was therefore admissible in evidence as to the truth of its contents. Wan Suleiman F J who delivered the judgment of the Federal Court said:

> There was no suggestion that the contents of this statement, as opposed to the fact that it was made, is inadmissible. That it is admissible for such purpose there can be no doubt. In *Sarkar on Evidence*, 12th Edition at page 191 appears the following passage:

> The declarations, admissions and acts of agents are admissible against their principals on grounds very similar to those which govern the declaration of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal. The rule is one of substantive law and not evidence. It is founded on the legal identity of interest subsisting between the parties. **They are original evidence and not hearsay**; and being regarded as verbal acts they are receivable in evidence without calling the agent himself to prove them. (*Doe v. Hawkins* [1841] 2 QB 212). (emphasis added.)

So counsel for the respondent was quite in error when he argued here and in the court below that the contents of the report P9 were hearsay and inadmissible. And we find ourselves in disagreement with the High Court's acceptance of this erroneous submission of counsel. The finding of inadmissibility of the contents of P9 on the ground of hearsay is accordingly reversed.

We now turn to consider the second finding made by the High Court, namely that the respondent was not liable to Chan under the policy of insurance. To recall, the first reason the learned judge gave for this finding was that the robbery was faked. This is how he put it:

> I must also say that the circumstance surrounding the alleged robbery and the disappearance of the insured is suspicious. It is indeed strange that the insured lodged the report (P8) more than 24 hours after the robbery. If indeed there was a robbery, one would expect the insured to lodge the report immediately. The insured seems to have disappeared in thin air, nobody even his wife does not know his whereabouts. If it is true that he was robbed there was no plausible reason that he should disappear and choose not to proceed with his claim against the defendant under the policy. To me the only reason I can think of why he disappeared is to avoid paying what he owed the 1st plaintiff. He knew that it would be difficult for him to give particulars of his claim especially details of the robbery.
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> Taking into consideration all these facts and these circumstances I am more inclined to conclude that the robbery was a fake and hold that there was no robbery. As a consequence I find there is no debt due to the 2nd plaintiff from the defendant.

This finding however contradicts the admission in the adjusters' report P9 that the robbery was genuine and not fraudulent. A finding that the robbery was faked and never happened cannot stand in the face of an admission to the contrary by the respondent. In our judgment, the appellant having adduced the admission in P9 discharged the tactical burden on it that the robbery was genuine and had indeed happened. The burden then shifted to the respondent to prove that the robbery was faked and never happened.

The law on the burden of proof in this case is governed by ss. 101 and 102 of the Evidence Act 1950. In accordance with s. 101, the legal burden of establishing that there is money owing from the respondent to Chan lies on the appellant. However, in accordance with s. 102, the evidential burden may move back and forth from the appellant to the respondent and *vice versa* in the course of the trial. On this point, we find it sufficient to quote from *Sarkar on Evidence*, 15th edn, vol. 2, p. 1452:

> There is an essential distinction between the 'burden of proof' as a matter of law and pleading and as a matter of adducing evidence. The burden in the first sense is always constant but the burden in the sense of adducing evidence shifts from time to time having regard to the evidence adduced or the presumption of fact or law raised in favour of one or the other (*Ajit Pd v. Nandini*, A [1975] Or 184). *If the prima facie case is not rebutted by cogent evidence and remains unanswered or the answer given does not create serious doubt in the mind of the court, then the burden of proof on the pleadings should be deemed to have been discharged* (*Mg Hmoot v. Offl Receiver*, 14 R 704: A [1937] R 276; see also *Bhola v. Bhagwat*, 13 CPLR 159; *Gangadin v. Bahoram*, A [1937] N 230). The true test of onus in the case of 'shifting' has been thus put by Lord Hanworth MR:
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> > It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence. (*Stoney v. Eastbourne R D Council* [1927] 1 Ch 367, 397).
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> This test was applied in *Nirmal v. Sant*, 16 P 622: A [1937] P 562. (emphasis added.)

At the trial the respondent did not adduce any evidence to show that Chan had faked the robbery. They therefore failed to discharge the evidential burden on them. Applying the principles set out in *Sarkar* quoted above, we have no difficulty in holding that the appellant had therefore discharged its legal burden of proof. Accordingly, we hold that the appellant had on a balance of probabilities established that the robbery was genuine.

We now come to the second reason given by the learned judge for rejecting the appellant's claim, namely, that Chan had breached a condition precedent of the policy of insurance in question. This is what the learned judge said about this part of the case:

> It is further submitted by the learned counsel for the defendant that there as a condition precedent to the liability of the insurer which is stipulated in condition 6 of the policy which says:
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> > The Assured shall in case of loss or damage and as a condition precedent to any right of indemnification in respect thereof give to the company such information and evidence as to the property lost or damaged and the circumstances of the loss or damage as the company may reasonably require and as may be in the Assured's power.
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> In the *Directors of the London Guarantee Company v. Benjamin Lester Fearley* (Vol. V – The Law Reports House of Lords 911) it was decided that non compliance of the term in an insurance contract which is stipulated to be a condition precedent furnishes a good defence to an action instituted against the insurers.
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> In *Chong Kok Hwa v. Taisho Marine & Fire Insurance Co. Ltd* [1977] 1 MLJ 244 it was decided *inter alia* by Ajaib Singh J (as he then was) that when a term in an insurance contract was stipulated to be a condition precedent to the liability of an insurer, the insurer was not liable under the policy unless the term has been strictly complied with by the insured.
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> The learned counsel for the first plaintiff argued that condition 6 is not a condition precedent but it is merely a condition precedent to give information and evidence as to the property lost. This contention is without merit as it is clear on reading condition 6 it is a condition precedent. The learned counsel also contended that condition 6 was never pleaded. This too has no merit as the defendants in their defence deny liability and condition 6 is one of the grounds relied upon to deny liability and therefore it need not be pleaded.

> In the present case the failure of the insured to cooperate with the insurers and to come forward to give information and evidence as to the property lost or damaged as required by the insurers to my mind is indeed non compliance with the condition precedent.
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> On the authority of London Guarantee and Chong Kok Hwa I find that the insured did not comply strictly with the condition precedent and hold that the defendant is not liable under the policy.

Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty – whether in contract or tort – may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct. So, in *Regina Fur Co Ltd v. Bossom* [1958] 2 Lloyd's Rep. 425, 428, Lord Evershed MR said:

> I think that a defendant – whether he is an underwriter or any other kind of defendant – is entitled to say, by way of defence, 'I require this case to be strictly proved, and admit nothing'. Where such is the defence, the onus remains throughout upon the plaintiffs to establish the case they are alleging. *Where such is the form of the pleading*, it is not only not obligatory upon the defendants but *it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged; and it is not, therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case.* The defendants are acting correctly if they follow the course adopted in this case – that is, so to challenge, at each point, and by proper evidence, where it is admissible, and by cross-examination, the case which the plaintiffs seek to make good.
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> The result, *where such is the form of the defence and of the issues raised*, is no doubt such that the *Judges will watch carefully that defendants, first, do not attempt, by evidence or cross-examination, to establish some affirmative case of which no proper notice has been given by way of pleading to the other side; and second, do not attempt to lead evidence solely directed to the credit of witnesses.* (emphasis added.)

Unfortunately, this is precisely the rule that the respondent breached in this case. The respondent before us, in its statement of defence, denied liability and put the appellant to strict proof of its claim that there had been a robbery. There was no plea of an affirmative case, namely, the breach of policy condition 6. It was therefore manifestly not open at trial for the respondent to pursue an unpleaded affirmative case alleging a breach of condition 6 and to succeed on that unpleaded case. Our courts have made

this point clear in many decisions. In *Haji Mohamed Pom v. Sakiman* [1956] MLJ 45, where the Court of Appeal (per Matthew CJ) held as follows (at p. 45):

> Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v. Pollard & Morris* [1930] 1 KB 628 (at p. 634).

In *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239, Jemuri Serjan SCJ (later CJ (Borneo)) made the stand of the courts fairly clear on the rule governing unpleaded cases. He said:

> It does not seem necessary for us to emphasize and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how such lapses in the courts should be tolerated at the expense of the clients.
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> Perhaps it would be sufficient and pertinent to repeat here in the hope that we have said the last words on this issue, what Raja Azlan Shah FJ (as he then was) said in *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 at p. 159:
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> > In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.
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> and what Sharma J said in *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 at p. 197:
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> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected.

> The faith and the confidence of the public in the law, the Constitution and the government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realize that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

The observations of Lord Edmund-Davies in the case of *Farrel v. Secretary of State* [1980] 1 All ER 166 at p 173 are equally pertinent:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it.

No criticism may be directed at the finding by the learned trial judge that Condition 6 is a condition precedent to the accrual of liability on the part of the defendants under the policy. However, based on the authorities we have cited a moment ago, we are unable, with respect, to agree with the learned judge that it is unnecessary for the respondent to plead the breach of Condition 6 in its defence. In our judgment the respondent's failure to plead a breach of policy Condition 6 disabled it from raising that issue at the trial. The learned judge ought not to have paid any attention to it.

Further, we are not entirely sure that it lay in the respondent's mouth to complain about Chan's conduct in this matter. The respondent itself owed a duty to act in good faith when dealing with the claim made on it by Chan: see, *Whiten v. Pilot Insurance Company* [2002] 209 DLR (4th) 257. In *Katotikidis v. Mr. Submarine Ltd* [2002] ACWSJ 10135, Taliano, J explained the judgment of the Supreme Court of Canada in *Whiten v. Pilot Insurance Company* as follows:

> I note that in upholding the award of punitive damages in Whiten, the court observed that a contract between an insurer and its insured was one of utmost good faith because, although the insurer is not a fiduciary, it holds a position of power over an insured since the insured is in a vulnerable position and is entirely dependent on the insurer when a loss occurs. For that reason, in every contract of insurance, **an insurer has an implied obligation to deal with the claims of its insured's in good faith.** It was held that a breach of the implied duty of good faith meets the requirement of an independent actionable wrong. (emphasis added.)

Here we have a case where the adjusters appointed by the respondent insurance company had investigated the incident and come to the conclusion that the robbery was entirely genuine. They told the respondent that that was indeed the case. So, the respondent knew that it was liable under the policy. Yet, the respondent with full knowledge of this fact went forward on a case based on a denial of liability. Now, that smacks of bad faith in relation to its handling of the claim made on it by Chan. In the light of these facts, it seems quite out of place for the respondent to complain about Chan's failure to cooperate. This is merely a case of the kettle calling the pot black.

We now come to the last ground on which the learned judge found for the respondent, namely that there was no attachable debt. In relation to this point, the learned judge said as follows:

> It is trite that the liability of the insurers under a policy is not a debt which could be attached. The order for attachment could only be made if the applicant (the plaintiffs in this case) successfully establish that there is in law a debt due from the garnishee to the judgment debtor (see *Israelson v. Dawson (Port of Manchester Insurance Company Limited; Garnishee* [1933] 1 KB 301, *France v. Piddington (Cooperative Insurance Society, Ltd. Garnishees* – Vol 43 – Lloyd's Law List Reports, 491).
>
> In the instant case in view of my finding that there is no debt due to the insured (2nd plaintiff) from the garnishee (defendant), I find in favour for the defendant.

Counsel for the respondent, both in his written submissions lodged in the court below and in his argument before us, relied heavily on *Israelson v. Dawson* and *France v. Piddington.* Both Scrutton and Greer LJ who decided the first were also members of the court that decided the second. The facts of both cases were identical on the point as to whether there was an attachable debt. The only difference is that the former was a personal

injuries claim while the latter was in respect of a fatal accident. The latter merely followed the former. Accordingly it is necessary for us to examine the former a little closer.

In *Israelson*, an insurance company issued a policy of motor insurance under which it agreed to indemnify the owner of a motor car against third party claims for personal injuries. There were conditions in the policy, such as, requiring the assured to give notice of any accident to the insurer and the obtaining of an award of an arbitrator. The policy also gave the insurance company power to control or settle any proceedings which might be brought against the assured by an injured third party. A third party injured plaintiff who obtained default judgment against the assured sought to attach, in garnishee proceedings, all debts owed by the insurance company to the assured. It was held by the Court of Appeal comprising Scrutton and Greer LJJ that the liability of the insurance company under the policy was not a debt which could be attached.

In his judgment Scrutton LJ said:

> The validity of this claim depends on whether a sum owing by an insurer to the assured is a sum in which the insurer 'is indebted to such debtor.' The plaintiff took out a summons for a garnishee order nisi that the Insurance Company should show cause why the debt due from them to the defendant should not be attached, and an order nisi was made. Master Ball refused to make the order absolute, or to order an issue. There was an appeal to the judge in Chambers, who has made the order absolute. In the proceedings in the Court below no reference was made to the words of the policy; there were no pleadings, and no notice was taken of the fact that the policy was issued before s. 38 of the Road Traffic Act, 1930, came into operation. Charles J, however, made an order that the judgment creditor and the garnishees should proceed to the trial of an issue, without defining the issue and without directing who should be the plaintiff in the issue. Possibly he did this in order to ascertain whether the garnishees owed the defendant anything.
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> Now he could not make an order in that form unless there was a debt due to the judgment debtor. I have come to the conclusion that as between assured and underwriter there is no debt. There may be a breach of contract or an obligation to indemnify, but there is nothing which can be called a debt or an indebtedness within the meaning of Order XLV., r. 1.

Greer LJ, in a separate judgment when agreeing with Scrutton LJ explained why there was no debt in that case:

> When an application is made under Order XLV., r. 1, to attach a debt, it may be that the garnishee does not dispute his indebtedness, and then an order may go and execution may be issued to attach the debt at once; but the garnishee may say 'I do dispute the debt,' in which case, if a *prima facie* case of indebtedness is made out, an order should be made for the trial of an issue. A mere doubt as to which party will succeed is not enough to justify a refusal to make the order. But in order to found jurisdiction to make any order for attachment or for the trial of an issue, the applicant must establish that there is in law a debt due from the garnishee to the judgment debtor.
>
> After consideration I have come to the conclusion that, whatever is due from the Insurance Company to the defendant, it is not a debt. The promise is in clause 1 of the policy. 'The Company shall indemnify the insured, ... as regards all sums for which the insured ... shall become legally liable to pay in respect of: (a) Accidental bodily injury to any person (including passengers in the car when being driven by the insured or by the insured's licensed driver) but excluding any person who is a member of the insured's household or in the insured's service and any person driving the car; and/or Accidental damage to property other than property actually belonging to or held in trust by or in the custody or control of the insured or being conveyed by the car in the United Kingdom and Irish Free State.
>
> Have the Insurance Company promised by this policy to pay the defendant in the action the 150*l.* for which judgment has been given? After full consideration I have come to the conclusion that they have not so promised, but that what they have promised is to indemnify him against such payment as he may have to make, and **they may do that, not by paying him anything, but by paying to some other persons the amount the insured has to pay them. That is not a promise to pay him anything**; it is one of the risks they undertake – namely, to indemnify him against legal liability incurred by him when driving a motor car. For these reasons I agree with the decision of Scrutton LJ. (emphasis added.)

The critical point in *Israelson* (and the same is true of *France v. Piddington*) is that the insurer agreed with the assured to pay a third party an unascertained sum on the happening of a particular event. There was no promise by the insurer to pay the assured a fixed sum on the happening of a particular event. Greer LJ makes it amply clear that it was on that ground that there was no attachable debt. In the instant appeal, the respondent promised Chan to pay him and not a third party in the event of a robbery. Accordingly, the present appeal is distinguishable on its facts from *Israelson* and *France v. Piddington.*

Now, it is one thing for A to say to B "I promise you that I will pay to X an indeterminate sum of money if you knock him down". It is a very different thing for A to say to B "I will pay you $500 if your car is stolen". In the first illustration given, the promise to pay X remains a promise even after the happening of the event. Further, X may not be able to recover the unliquidated sum from A because of the doctrine of privity of contract unless he brings himself within one of the limited exceptions to that doctrine. In the second illustration, the promise is made by A to pay B. Once B's car is stolen, the event specified happens and the promise crystallises into a debt owed by A to B. It would make nonsense of the law of contract if one continues to refer to A's promise in the second illustration as a mere promise even after the happening of the specified event, namely, the theft of the car. It is now not difficult to see that *Israelson* as well as *France v. Piddington* come plumb within the first illustration and that the facts of the present appeal fit neatly within the second.

The position does not change where the issue arises in garnishee proceedings. This is because a judgment creditor attaching a debt in the hands of the garnishee steps into the shoes of the judgment debtor and cannot therefore take a better right against the garnishee than that held by the judgment debtor. As Neal J put it in *Chan Kong Choy v. Inder Singh* [1961] MLJ 1 at p. 3:

> The third reason why I would allow this appeal is that on the authority of *In re General Horticultural Association Ex parte Whitehouse* [1886] 32 Ch D 512, **the judgment creditor cannot stand in a better position than the judgment debtor did and can only obtain what the judgment debtor could honestly give him.** It is, in my opinion, beyond question that Hussain, the judgment debtor in this case, could not have claimed an estoppel as against the appellant. (emphasis added.)

The judgment creditor is therefore liable to have his claim defeated by any defence that the garnishee may have against the judgment debtor. But in order to succeed, the garnishee must plead any defences he may have against the judgment debtor. For, the garnishee is not exempted from the rules governing pleadings and if he fails to observe them, he risks being shut out by the rule on unpleaded cases. We have already discussed this earlier in this judgment. We merely reiterate that courts are fairly strict about permitting parties to raise and argue unpleaded issues as may be seen from the cases referred to in paras. 20 and 21 of this judgment.

That brings us to the question argued at length before us. Based on the particular facts of this case, was there a debt owing from the respondent to Chan as at the date when the attachment proceedings were commenced by the appellant? In answering this question we derive much assistance from the following passage in the judgment of Venkatarama Iyer J delivered on behalf of a Full Bench of the Supreme Court of India in *Shanti Prasad Jain v. Director of Enforcement Foreign Exchange Regulation Act* AIR [1962] SC 1764:

> A contingent debt is strictly speaking not a debt at all. In its ordinary as well as its legal sense, a debt is a sum of money payable under an existing obligation. It may be payable forthwith, solvendum in praesenti, then it is a debt 'due' or it may be payable at a future date, solvendum futuro; then it is a debt 'accruing". But in either case it is a debt. But a contingent debt has no present existence, because it is payable only when the contingency happens, and *ex hypothesi* that may or may not happen.
>
> The question whether a contingent debt is a debt as understood in law has often come up for consideration before English Courts in connection with garnishee proceedings taken by judgment creditors to attach it as a debt. The decision has invariably been that they are not debts 'accruing' and could not be attached. In *Webb v. Stenton* [1883] 11 QBD 518 the point for decision was whether an amount payable by a trustee to the beneficiary in future could be attached by a judgment creditor as a debt 'owing or accruing', and it was answered in the negative. Discussing the distinction between an existing debt and a contingent debt, Lord Lindley observed:
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> > I should say apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in praesenti*, solvendum in future. An accruing debt, therefore, is a debt not yet actually payable but a debt which is represented by an existing obligation. The result seems to me to be this: you may attach all debts, whether equitable or legal; but only debts can be attached; and money which may or may not become payable from a trustee to his *cestui que* trust are not debts.
>
> The meaning of 'accruing debt' observed Lord Blackburn in *Tapp v. Jones* [1875] 10 QB 591 'is debitum in praesenti solvendum in futuro; but it goes no further, and it does not comprise anything which may be a debt, however, probable or however soon it may be a debt'.

> **The law is thus well settled that a contingent debt is no debt until the contingency happens,** and as the right of the appellant to the amount in deposit in his name in the Deutsche Bank arises only, on the happening of the contingencies already mentioned, it follows that there is no debt due to him in praesenti ... (emphasis added.)

Now, applying the definition of a debt by Lindley LJ in *Webb v. Stenton* and accepting the proposition that a contingent debt is not a debt until the contingency happens, it is clear that on the facts of the present case, the requisite contingency has happened. The question posed, namely, whether there was a debt owing from the respondent to Chan as at the date when the attachment proceedings were commenced by the appellant, must be answered in the affirmative.

We would then summarise our views as follows. The respondent's promise to indemnify Chan in the event of a genuine robbery crystallised on the happening of the robbery. The fact that the robbery was genuine and not faked is established by the respondent's own document which is not hearsay but original evidence. The respondent's allegation that there were other breaches by Chan and that therefore there was no debt due and owing is inadmissible as these were never pleaded. Accordingly, there was at all material times a debt due and owing in praesenti from the respondent to Chan which was capable of being attached by the appellant in the hands of the respondent at the date of the garnishee proceedings: see, *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd* [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645, per Lim Beng Choon J.

For the reasons already given, the appeal is allowed. The order of the High Court is set aside. Judgment is entered in the appellant's favour in the sum of RM600,000 together with interest at the rate of 8% per annum from 21 November 1985 until realisation. The respondent must pay the costs of this appeal and all costs incurred in the court below. The deposit paid into court shall be refunded to the appellant.